



Citation: *MS v Canada Employment Insurance Commission*, 2024 SST 685

## **Social Security Tribunal of Canada Appeal Division**

# **Decision**

<b>Appellant:</b>	M. S.
<b>Respondent :</b>	Canada Employment Insurance Commission
<b>Representative:</b>	Adam Forsyth

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<b>Decision under appeal:</b>	General Division decision dated February 29, 2024 (GE-23-3241)
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<b>Tribunal member:</b>	Solange Losier
<b>Type of hearing:</b>	Videoconference
<b>Hearing date:</b>	June 10, 2024
<b>Hearing participants:</b>	Appellant Respondent's representative
<b>Decision date:</b>	June 19, 2024
<b>File number:</b>	AD-24-249

## Decision

[1] I am allowing the Claimant's appeal and returning the matter to the General Division to reconsider the late appeal issue.

## Overview

[2] M. S. is the Claimant in this case. She applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to get EI benefits from June 25, 2023.<sup>1</sup> It found that she didn't have a valid work permit, so she was not considered available for work.

[4] The General Division decided that the Claimant's appeal could not move forward because it was filed late.<sup>2</sup> It found that she had not provided a reasonable explanation for the delay. As a result, the General Division didn't make any decisions about the underlying issues (work permit and availability for work).

[5] The Claimant appealed the General Division's decision to the Appeal Division.<sup>3</sup> She argues that the General Division made several errors.

[6] I have found that the General Division made an error of fact, so I am allowing the Claimant's appeal. The matter will return to the General Division for reconsideration.

## Issues

[7] The issues in this appeal are:

- a) Did the General Division make a reviewable error?
- b) If so, how should the error be fixed?

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<sup>1</sup> See Commission's initial decision at pages GD3-40 and GD3-43 to GD3-44.

<sup>2</sup> See General Division's decision at pages AD1A-1 to AD1A-7.

<sup>3</sup> See application to the Appeal Division at pages AD1-1 to AD1-12. I gave her permission to appeal because she had an arguable case that the General Division made an error of fact.

## Analysis

[8] I can intervene if the General Division made a reviewable error. This includes a jurisdictional error, procedural error, legal error, or certain types of factual errors.<sup>4</sup>

[9] For example, an error of fact happens when the General Division bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.<sup>5</sup>

– **The Claimant argues that the General Division made two errors**

[10] The Claimant argues that the General Division made several errors, but at the Appeal Division hearing she focused only on two specific errors.<sup>6</sup> A summary of the Claimant's main arguments at the hearing follows.

[11] First, she says that the General Division made an important mistake with the facts when it found that her appeal was filed late. She argues that the appeal was not late because it was submitted within the 30-day deadline from the date of communication.

[12] The Claimant explained that she received the Commission's reconsideration decision by mail on October 19, 2023<sup>7</sup> and filed her appeal to the General Division on November 17, 2023.<sup>8</sup> She says this is only 29 days, and so she didn't need to provide a reasonable explanation for the delay because it wasn't late.

[13] Second, she argues that the General Division made a legal error when it rejected her appeal on a "technicality" (lateness). Because of that, she says that the General

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<sup>4</sup> See section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) and section 59(1) of the DESD Act.

<sup>5</sup> See section 58(1)(c) of the DESD Act.

<sup>6</sup> See Claimant's arguments at pages AD1-1 to AD1-12 and AD7-1 to AD7-22.

<sup>7</sup> The Claimant argues that October 19, 2023 was the date the reconsideration decision was communicated to her.

<sup>8</sup> See appeal to the General Division at pages GD2-1 to GD2-18.

Division failed to make a decision about the underlying issues in her appeal (i.e., work permit and availability for work).<sup>9</sup>

– **The Commission agrees that the General Division made errors**

[14] The Commission agrees that the General Division made errors. A summary of the Commission's main arguments at the hearing follows.<sup>10</sup>

[15] First, the Commission says that the General Division erred because it didn't consider the Claimant's explanation of when she received notification of the reconsideration decision.

[16] Second, the Commission says the General Division also erred when it failed to provide sufficient reasons for not accepting the Claimant's explanation but chose to rely on the telephone notes instead.

[17] Third, the Commission says that there were ambiguities in the General Division's interpretation of the evidence around the number of days the appeal was late. It said that the approach taken by the General Division was inconsistent.

– **The General Division decided that the Claimant's appeal was filed late, and it refused to give an extension**

[18] The law says that an Appellant has 30 days to appeal a decision made under the *Employment Insurance Act* (EI Act) to the General Division after the day on which it was communicated to the Appellant.<sup>11</sup>

[19] The *Social Security Tribunal Rules of Procedure* (SST Rules) allows an Appellant who files a notice of appeal after the (30-day) deadline to ask for more time. In order to do so, they have to file an explanation with the Tribunal to explain why they are late.<sup>12</sup>

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<sup>9</sup> See Commission's reconsideration decision at pages GD3-43 to GD3-44.

<sup>10</sup> See Commission's arguments at pages AD3-1 to AD3-6.

<sup>11</sup> See section 52(1)(a) of the DESD Act and section 24(3) of the *Social Security Tribunal Rules of Procedure* (SST Rules).

<sup>12</sup> See section 27(1) of the SST Rules.

[20] The Tribunal can give an Appellant more time to file an appeal if they have a reasonable explanation for the delay.<sup>13</sup>

[21] The General Division first decided that the Commission's reconsideration decision involving the Claimant's availability and work permit was verbally communicated to her on September 28, 2023. It relied on the Commission's notes from a telephone discussion with the Claimant.<sup>14</sup>

[22] The General Division determined that the Claimant had filed her appeal to the General Division on November 21, 2023, and that it was filed late.<sup>15</sup>

[23] The General Division ultimately decided that it could not give the Claimant more time to appeal because she hadn't provided a reasonable explanation for the delay in filing her appeal.<sup>16</sup>

– **The General Division overlooked one of the Claimant's main arguments about the Commission's telephone notes**

[24] Before the General Division, the Claimant had provided several written arguments to support her case.<sup>17</sup>

[25] The Claimant's written arguments show that she disputed the contents of the Commission's telephone notes. She wrote that the Commission agent she spoke with omitted relevant parts of their telephone conversation in the telephone notes.<sup>18</sup> She also argued that the telephone notes were false.<sup>19</sup>

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<sup>13</sup> See section 27(2) of the SST Rules.

<sup>14</sup> See page GD3-39 and paragraph 12 of the General Division decision.

<sup>15</sup> See paragraphs 11 and 22 of the General Division decision.

<sup>16</sup> See paragraphs 27–30 of the General Division decision.

<sup>17</sup> See pages GD2-1 to GD2-18; GD7-1 to GD7-13; GD9-1 to GD9-3 and GD11-1 to GD11-9. In the Claimant's written arguments to the General Division, she refers to the "General Division" errors but it is clear from the substance of her arguments that she was saying the Commission made these errors.

<sup>18</sup> See page GD7-9.

<sup>19</sup> See page GD7-13.

[26] As noted above, the General Division relied on the Commission's telephone notes when it found that the reconsideration decision had been communicated to the Claimant verbally on September 28, 2023.<sup>20</sup>

[27] I find that the General Division made an error by overlooking one of the Claimant's main arguments resulting in "an erroneous finding of fact without regard to the material before it".<sup>21</sup> Specifically, it overlooked her argument that the Commission's telephone notes omitted relevant information from their discussions. As well, she argued that the Commission's telephone notes were false.

[28] The General Division should have directly addressed the Claimant's argument about the Commission's telephone notes in its decision when it determined that the reconsideration was verbally communicated to her. This was important to do because the Claimant was challenging the Commission's telephone notes when she wrote they were inaccurate and false. Also, the General Division is the trier of fact, but it can't overlook arguments that challenge or contradict its key findings without explaining why.

[29] Since I have found one error, it is not necessary to consider other alleged errors. I will now consider how to fix that error.

### **Fixing the error**

[30] There are two options for fixing an error made by the General Division.<sup>22</sup> I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.

[31] To give the decision that the General Division should have given, the record needs to be complete. If I substitute with my own decision, I am allowed to make necessary findings of fact.<sup>23</sup>

[32] In this case, the parties don't agree on how I should fix the error.

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<sup>20</sup> See page GD3-39 and paragraphs 12, 16 and 18 of the General Division decision.

<sup>21</sup> See section 58(1)(c) of the DESD Act.

<sup>22</sup> See section 59(1) of the DESD Act.

<sup>23</sup> See section 64 of the DESD Act.

– **The Claimant wants the Appeal Division to make a decision**

[33] The Claimant wants the Appeal Division to render the decision the General Division should have. She argues that she has proven her case and wants me to decide that she be entitled to EI benefits.

[34] The Claimant doesn't want the matter to be returned to the General Division. She explained that her appeal was already rejected by the General Division, and she doesn't think it acted in good faith towards her.

– **The Commission says that the matter should be returned to the General Division**

[35] The Commission says that the Appeal Division doesn't have enough evidence to step in and substitute with its own decision. It submits that the matter should be returned to the General Division for reconsideration so that the Claimant can have an opportunity to present all of her arguments.

– **The matter will go back to the General Division for reconsideration**

[36] I find that this matter should go back to the General Division for reconsideration on the late appeal issue.

[37] The General Division only decided about the lateness of the Claimant's appeal. It did not render a merits decision on the underlying issues (work permit and availability).

[38] The record is not complete. I don't have enough information to make a decision. The Claimant hasn't had a full and fair opportunity to present her case to the General Division.

[39] If the Claimant is successful on the late appeal issue at the General Division, she will then have a hearing and an opportunity to present her arguments and evidence on the underlying issues.

## **Conclusion**

[40] The Claimant's appeal is allowed. The General Division made a reviewable error. The matter will return to the General Division for reconsideration to consider the late appeal issue.

Solange Losier  
Member, Appeal Division